

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID LIONEL CARPENTER,
Petitioner,
v.
MARCUS POLLARD, Warden,
Respondent.

No. 2:20-cv-0908 WBS KJN P

ORDER

Petitioner is a state prisoner, proceeding pro se, with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Presently before the court is respondent's motion to dismiss the petition for failure to exhaust state remedies. Petitioner filed an opposition; respondent did not file a reply. As explained below, petitioner is ordered to inform the court how he would like to proceed in this action.

I. Motion to Dismiss

Petitioner challenges his Butte County Superior Court conviction for kidnapping, inflicting corporal injury on his ex-girlfriend, and criminal threats. (ECF No. 21-1.) Petitioner raises twelve claims in the first amended petition: (1) ineffective assistance of trial counsel by failing to object to stacking charges, and appellate counsel was ineffective by not appealing that issue to the California Supreme Court; (2) ineffective assistance of counsel (Leo Battle) by failing to investigate and communicate with Petitioner; (3) ineffective assistance of counsel (Jesus

1 Rodriguez) before trial by failing to investigate or communicate with petitioner; (4) ineffective
2 assistance of counsel (Jesus Rodriguez) for lack of pre-trial investigation, preparation, and failure
3 to defend; (5) prosecutorial misconduct; (6) judicial misconduct, abuse of discretion, judicial
4 errors, denial of due process; (7) ineffective assistance of counsel (Jesus Rodriguez), denial of
5 due process, denial of fair trial; (8) Butte County Superior Court denied petitioner due process of
6 law and abuse of discretion by denying habeas corpus petition on procedural grounds;
7 (9) ineffective assistance of counsel (Susan Shaler); (10) lack of jurisdiction by trial court to
8 consider habeas corpus petition CM042939; (11) ineffective assistance of counsel (Susan Shaler)
9 by failing to investigate and file habeas corpus petition with Court of Appeal; and
10 (12) denied due process by the California Supreme Court. (ECF No. 15.)

11 Respondent argues that the instant petition is a mixed petition because petitioner failed to
12 raise all twelve claims in the California Supreme Court. Rather, petitioner raised only four claims
13 in the state appellate court: (1) denial of due process when the Butte County Superior Court
14 denied original habeas corpus petition on procedural grounds; (2) appellate counsel failed to
15 provide adequate representation on direct appeal by failing to raise all arguable issues for
16 appellate review; (3) superior court judge did not have jurisdiction to consider petitioner's
17 original habeas corpus petition (conflict of interest based on ruling in prior proceedings); and
18 (4) ineffective assistance of appellate counsel because she failed to investigate and file a habeas
19 corpus petition in conjunction with the direct appeal filed in the Court of Appeal.

20 Moreover, respondent lodged state court documents confirming that in the habeas petition
21 filed in the California Court of Appeals, petitioner raised only those four claims, and did not raise
22 claims one through seven that petitioner raised in the petition filed in the superior court.
23 (Compare ECF Nos. 21-6 to 21-8.) Petitioner's claim twelve has not been presented to any state
24 court.

25 In opposition, petitioner concedes that exhaustion of state court remedies is required, but
26 argues that he has exhausted claims one through seven because once each petition was denied by
27 the superior court and the court of appeals, respectively, the petitions were advanced to the
28 California Supreme Court. (ECF No. 22 at 2.) Petitioner contends he specifically requested that

1 the California Supreme Court review the grounds raised by writs of habeas corpus, and provided
 2 copies of both petitions. (ECF No. 22 at 2, citing ECF No. 21-11 at 3.)

3 Exhaustion Standards

4 The exhaustion of state court remedies is a prerequisite to the granting of a petition for
 5 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived
 6 explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion, thus, may
 7 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the
 8 highest state court with a full and fair opportunity to consider all claims before presenting them to
 9 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d
 10 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). For a California prisoner to
 11 exhaust, he must present his claims to the California Supreme Court on appeal in a petition for
 12 review or post-conviction in a petition for a writ of habeas corpus in which he adequately
 13 describes the federal Constitutional issue that he asserts was violated. See Gatlin v. Madding,
 14 189 F.3d 882, 888 (9th Cir. 1999).

15 Discussion

16 Here, petitioner is mistaken. The habeas petition filed in the state superior court does not
 17 advance directly to the California Supreme Court. The record confirms that the California
 18 Supreme Court imported the record from the California Court of Appeal. (ECF No. 21-12.)
 19 Moreover, the petition for review filed in the California Supreme Court, consisting of two pages
 20 of text, lists no claims or facts, but rather simply asks the state's highest court to review the issues
 21 raised in petitioner's earlier petitions. (ECF No. 21-11 at 2-3.) Such a filing is insufficient for the
 22 state highest court to review claims petitioner raised only in the petition filed in the state superior
 23 court. For purposes of federal habeas review, the silent denial issued by the California Supreme
 24 Court constitutes a denial "on the merits" of petitioner's claims raised in the state court of appeal.
 25 See Ylst v. Nunnemaker, 501 U.S. 797, 803-06 (1991); see Wilson v. Sellers, 138 S. Ct. 1188,
 26 1194-95 (2018) (federal court "looks through" the silent decision to identify the grounds for the

27 ¹ A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C.
 28 § 2254(b)(2).

1 higher court's decision). Thus, to the extent petitioner's federal claims eight through eleven
2 challenge the four state claims raised on appeal, petitioner's claims one through seven are
3 therefore unexhausted.

4 As for claim twelve, petitioner is required to exhaust the claim before the California
5 Supreme Court, even though his claim pertains to the alleged failure of that court to hold an
6 evidentiary hearing. A California prisoner seeking relief with respect to a conviction is required
7 to "fairly present" his federal claims to the California Supreme Court. See Baldwin v. Reese, 541
8 U.S. 27, 29 (2004) (a state prisoner must fairly present his claim to a state supreme court having
9 the power of discretionary review); Keating v. Hood, 133 F.3d 1240, 1242 (9th Cir. 1998). To
10 fairly present a claim to the California Supreme Court, the petitioner must describe not only the
11 operative facts but also the federal legal theory on which the claim is based. See Davis v. Silva,
12 511 F.3d 1005, 1009 (9th Cir. 2008).

13 Consequently, after reviewing the record in this action, the court finds that petitioner has
14 failed to exhaust state court remedies as to claims one through seven, and twelve. Accordingly,
15 the petition is a mixed petition containing both exhausted and unexhausted claims. The court will
16 advise petitioner of his options regarding exhaustion and warn him that deleting his unexhausted
17 claims may prevent him from bringing those claims in any future federal habeas proceedings.

18 II. Petitioner's Options

19 The United States Supreme Court has held that a federal district court may not entertain a
20 petition for habeas corpus unless the petitioner has exhausted state remedies with respect to each
21 of the claims raised. Rose v. Lundy, 455 U.S. 509, 522 (1982). A mixed petition containing both
22 exhausted and unexhausted claims must be dismissed. Id.

23 Because the petition contains unexhausted claims, this court is required to give petitioner
24 the choice of exhausting the unexhausted claims by returning to state court or abandoning the
25 unexhausted grounds and pursuing the exhausted grounds in federal court. Jefferson v. Budge,
26 419 F.3d 1013, 1016 (9th Cir. 2005); see also Butler v. Long, 752 F.3d 1177, 1181 (9th Cir.
27 2014), as amended on denial of reh'g and reh'g en banc, (June 24, 2014) (per curiam) (district
28 court erred in dismissing the mixed habeas petition without first giving petitioner the opportunity

1 to amend his petition to include only exhausted claims). Thus, petitioner has the following
2 options:

3 1. Petitioner may choose to dismiss the entire petition without prejudice. However,
4 petitioner is cautioned that such dismissal could result in a statute of limitations bar against any
5 federal petition he may subsequently file.²

6 2. Petitioner may proceed on an amended petition raising only the four exhausted claims
7 described above. Petitioner should provide such an amended petition if he chooses this option.

8 3. Petitioner may file a request to stay this action pending exhaustion of state court
9 remedies with respect to the unexhausted claims pursuant to Rhines v. Weber, 544 U.S. 269
10 (2005). Under Rhines, a district court may stay, in limited circumstances, a mixed petition
11 pending exhaustion of unexhausted claims if: (1) the petitioner had good cause for his failure to
12 exhaust; (2) his unexhausted claims are potentially meritorious; and (3) there is no indication that
13 the petitioner engaged in intentionally dilatory litigation tactics. Id., 544 U.S. at 278. Each of
14 these three conditions must be satisfied.

15 4. Petitioner may file an amended petition which includes only petitioner's fully
16 exhausted federal claims described above, along with a request that the amended petition be
17 stayed pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). Under the Kelly stay
18 procedure, "(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court
19 stays and holds in abeyance the amended, fully exhausted petition, allowing the petitioner the
20 opportunity to proceed to state court to exhaust the deleted claims; and (3) the petitioner later
21 amends his petition and re-attaches the newly-exhausted claims to the original petition." King v.
22 Ryan, 564 F.3d 1133, 1134 (9th Cir. 2009). But petitioner is allowed to amend newly-exhausted

23 ² Petitioner is cautioned that the habeas corpus statute imposes a one-year statute of limitations
24 for filing non-capital habeas corpus petitions in federal court. In most cases, the one-year period
25 will start to run on the date on which the state court judgment became final by the conclusion of
26 direct review or the expiration of time for seeking direct review, although the statute of
27 limitations is tolled while a properly filed application for state post-conviction or other collateral
28 review is pending. 28 U.S.C. § 2244(d). Although § 2244(d)(2) provides for such statutory
tolling, "[u]nder Duncan v. Walker, 533 U.S. 167 (2001), the filing of a petition for federal
habeas corpus relief does not toll AEDPA's statute of limitations. King v. Ryan, 564 F.3d 1133,
1141 (9th Cir. 2009).

1 claims back into his federal petition only if the statute of limitations has not yet expired, or the
2 claims “relate back” to the timely exhausted claims in the federal petition. King, 564 F.3d at
3 1140-41. This court makes no finding at this time whether such motion to amend would be
4 appropriate or timely under Mayle v. Felix, 545 U.S. 644 (2005). If petitioner chooses to request
5 a stay under Kelly, he should provide an amended petition.


6 Petitioner is cautioned that if he chooses to proceed now on an amended petition raising
7 only the four exhausted claims he will risk forfeiting consideration of the unexhausted claims in
8 this or any other federal court. See McCleskey v. Zant, 499 U.S. 467 (1991); see also Rose, 455
9 U.S. at 520-21; Rule 9(b), Rules Governing Section 2254 Cases.

10 III. Conclusion

11 In accordance with the above, IT IS HEREBY ORDERED that petitioner notify the court,
12 within thirty days from the date of this order, which of the four options he chooses. Petitioner is
13 cautioned that if he fails to choose one of the four options set forth above, the undersigned will
14 recommend that respondent’s motion to dismiss be granted, and the petition be dismissed as a
15 mixed petition.

16 Dated: February 19, 2021

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE